No. 9294

In the United States Circuit Court of Appeals

For the Ninth Circuit.

LUMBERMENS MUTUAL CASUALTY COMPANY, a corporation,

Appellant,

vs.

MRS. LEOTIA E. McIVER, JEFF CLARK, GRACE VAUGHN, a minor, and LORAINE JOHNSON,

Appellees.

APPELLANT'S OPENING BRIEF.

C. F. JORZ,
909 Rowan Building, Los Angeles,
Attorney for Appellant.

Parker & Baird Company, Law Printers, Los Angeles.

TOPICAL INDEX.

TABLE OF AUTHORITIES CITED.

CASES.

STATUTES.

No. 9294

In the United States Circuit Court of Appeals

For the Ninth Circuit.

LUMBERMENS MUTUAL CASUALTY COMPANY, a corporation,

Appellant,

vs.

MRS. LEOTIA E. McIVER, JEFF CLARK, GRACE VAUGHN, a minor, and LORAINE JOHNSON,

Appellees.

APPELLANT'S OPENING BRIEF.

Statement of Jurisdictional Elements.

The above entitled cause was instituted by appellant in the District Court of the United States, Southern District of California, Central Division. Appellant is a citizen of the State of Illinois and appellees are citizens of the State of California [Complaint, Par. I, R. 2-3]. The amount involved, exclusive of interest and costs, is in excess of $3000.00 [Complaint, Par. II, R. 3]. The complaint seeks a declaratory judgment and decree construing the involved clause of a policy of insurance issued to appellees, Mrs. Leotia E. McIver and Jeff Clark [R. 2-31].

The action being thus of a civil nature between citizens of different states in an amount in excess of $3000.00 the jurisdiction of the District Court vests under the laws of

the United States, the relative Acts of Congress being Sections 563 and 529, Revised Statutes, Section 24 of the Judicial Code as amended, compiled under Title 28, U. S. C. A., Section 41, sub-paragraph (1) and the Declaratory Judgment Act being Chapter 231 of the Act of Congress of March 3, 1911, as amended, Sec. 274 (d) of the Judicial Code as amended, compiled under Title 28, U. S. C. A., Section 400.

The Circuit Court of Appeals has jurisdiction to review the judgment hereby appealed from under the laws of the United States, the relevant Acts of Congress being Chapter 517 of the Act of March 3, 1891, as amended, being Section 128 of the Judicial Code as amended, compiled under Title 28, U. S. C. A., Section 225, sub-paragraph (a).

Statement of the Case.

The instant action is one in which appellant seeks judicial declaration of its policy of automobile liability insurance. A copy of said policy appears in the record, pages 2 to 31.

Appellant issued its certain policy of insurance to appellees Mrs. Leotia E. McIver and Jeff Clark covering a certain Essex Terraplane automobile owned by Mrs. McIver.

On January 26, 1939, while Jeff Clark was in Santa Monica, California, he allowed appellee Grace Vaughn to operate and drive the automobile insured under said policy. Clark was teaching her to drive. Grace Vaughn was of the age of fourteen (14) years and was not licensed by the State of California to operate or drive automobiles.

The said automobile was involved in an accident with appellee Loraine Johnson, who was a pedestrian.

The complaint alleged the operation of the automobile by Grace Vaughn. Such allegation was denied by appellees and they affirmatively alleged that Jeff Clark operated and drove the automobile at the time of accident [McIver and Clark, Par. II, R. 33; Johnson, Par. II. R. 36].

At time of trial all allegations of the complaint save the allegation as to the operation of the automobile by Grace Vaughan were stipulated to be true [R. 45-46]. This stipulation limited the fact to be tried to be the operation of the automobile [R. 50].

The policy in question excluded coverage when the automobile was being operated by any person such as Grace Vaughn, or any other person in violation of the driving laws pertaining to age. The language of said policy as to such a condition is as follows:

> "Under any of the above coverages, while the automobile is operated by any person under the age of fourteen years, *or by any person in violation of any state law,* federal or provincial law *as to age applicable to such person.* . . ."

Jeff Clark, in reporting the accident to appellant [R. 94 to 98, incl.; 83 to 85, incl.], as required by the policy stated that the automobile at the time of the accident was being operated by Grace Vaughn. He described that he was in Los Angeles for a medical treatment for his right arm and shoulder. That in the past three months he had not been able to use his right arm and shoulder without the aid of his left hand.

When the automobile was within 15 or 20 feet from the boundary of the intersection of 14th and Montana streets in said City of Santa Monica he noticed that Grace Vaughn

was not slowing down enough to avoid striking some automobiles that were standing ahead of and in the path being taken by the automobile in question.

Jeff Clark further reported that when he observed that the automobile was not slowing down he spoke to Grace Vaughn and said, "Put your brakes on, Gracie." Grace Vaughn applied the brakes but said brakes did not hold.

Grace Vaughn steered the automobile to the left of the standing automobiles. This placed the automobile over on the left-hand side of the street and while pursuing this course it struck appellee Loraine Johnson. For a visual description of the course taken see diagram [R. 98].

It was likewise reported by Jeff Clark that at the time his automobile struck Loraine Johnson, Grace Vaughn had both hands on the steering wheel; had control of his automobile and he was trying to get hold of the emergency brake lever with his left hand but did not succeed in doing so until after the collision occurred. The arms and legs of Grace Vaughn prevented him from reaching the emergency brake. He was seated on the right side of the front seat, with both hands in front of him. He did not touch the accelerator, brakes or clutch pedal with his feet and the first time he grabbed the steering wheel was after his automobile had traveled several feet past the point of impact. The touching of the wheel as to this point was to steer his automobile back to its right-hand side of the highway [R. 85].

The manner of happening of the accident as originally reported was changed by Jeff Clark at the time of trial. He denied the truth of the foregoing statements and asserted at the time of trial that he did grab the steering

wheel in order to miss the standing automobiles which were in the path his automobile was taking. Clark also testified (contrary to his original report) that he reached for the emergency brake and was applying it at the time of impact. While applying the emergency brake he likewise was steering the automobile and notwithstanding the multiple efforts thus exerted he could not avoid the accident.

His explanation for the variance in his testimony from that as originally reported was disclosed to be based on a discussion of the accident had with Grace Vaughn the evening before testifying. At that conference Grace Vaughn convinced him that she relinquished control and that he was the factor in steering the automobile.

Grace Vaughn testified as a witness in behalf of Jeff Clark that Mr. Clark grabbed the steering wheel to miss the automobile ahead. What he did after he grabbed the steering wheel the witness could not remember [R. 130]: "It happened so quick I don't know." The witness did remember that at the time of the accident she put her foot on the clutch "and the brake, too." Likewise, she was sitting erect up at the steering wheel at all times involved herein [R. 133].

Maxine Vaughn, who was the third occupant sitting in the front seat testified for Mr. Clark that her sister Grace had been operating the automobile twenty minutes. Grace had not driven an automobile before and started to drive from in front of the family residence at 1325 Fourth street, Santa Monica. As the automobile was going west on Montana street, Jeff Clark was saying, "You better slow down," and that he grabbed the wheel to miss "that car stopped, and then he hit Mrs. Johnson and we went

about a block further before he could finally stop it." [R. 136].

The trial court found that Grace Vaughn did not operate any of the driving devices at the time of accident [Par. 5, Findings, R. 65]; that the automobile at the time of accident was operated by Jeff Clark and not operated by any person in violation of the Vehicle Code of California and not at the time of accident by Grace Vaughn [Par. 10, Findings, R. 67] and held the exclusionary clause in question not applicable. Judgment that appellant was not entitled to the declaratory relief as prayed followed [R. 69].

Questions Involved.

From the foregoing statement of facts, it appears to appellant that the questions involved are:

1. Do the acts of Jeff Clark, who was sitting beside the driver Grace Vaughn, in seizing the wheel immediately prior to the accident and in reaching for the emergency brake, constitute sufficient evidence as a matter of law to support a finding that he alone was the operator of the automobile at the time of accident?

2. Assuming for purpose of argument that said acts of Jeff Clark made him an operator of the automobile, did the trial court abuse its discretion in not applying to such fact established principles of law which hold that joint operation of the automobile in violation of law as to age is likewise included within the exclusionary clause of the contract involved in the litigation at bar?

Specification of Errors Assigned.

"I.

The trial court erred in finding as set forth in paragraph 5 of the findings of fact as follows:

> '5. * * * that when the automobile described in the policy was within approximately forty feet to the east of said stopped westbound automobile, Jeff Clark seized the steering wheel with both hands and swerved the automobile described in the policy to the left and over to the south side of said Fourteenth street and past said stopped automobiles; * * *
>
> '* * * that prior to the impact and while Jeff Clark was steering the automobile described in the policy, he reached, with his left hand, across Grace Vaughn's lap for the emergency brake lever of the automobile described in said policy and applied the said emergency brake, keeping his left hand on said emergency brake lever; that said emergency brake lever is located on the left hand side of the steering wheel of the automobile described in the policy; that after Clark seized the steering wheel Grace Vaughn did not attempt to steer the car or to operate the clutch or brake pedal; * * *'

on the grounds that said finding is not supported by the evidence and is against law.

II.

The trial court erred in finding as set forth in paragraph 10 of the findings of fact as follows:

> 'That the automobile at the time of the accident was operated by said Jeff Clark and was not operated by any person in violation of the Vehicle Code of the State of California; that said automobile at the time

of said accident was not operated by said Grace Vaughn'

on the grounds that said finding is not supported by the evidence and is against law.

III.

The trial court erred in finding as set forth in paragraph 11 of the findings of fact as follows:

'That it is true that the plaintiff's policy of insurance in fact covers and applies to the said defendants and each of them and the plaintiff is under obligation to defend said defendants and each of them and to pay any judgment that may be rendered against them under the law and statutes of the State of California or the United States of America within the liability mentioned in said policy.'

upon the grounds that said finding is not supported by the evidence and is against law.

IV.

The trial court erred in finding as set forth in paragraph 12 of the findings of fact as follows:

'That it is not true that the defendants are not entitled to coverage, protection or reimbursement under said policy but that said defendants are entitled to have plaintiff in this action defend and represent said action and pay and discharge any judgment or liability that might arise therefrom'

on the grounds that said finding is not supported by the evidence and is against law.

V.

The trial court erred in its conclusions of law as follows:

'1. That at the time of the accident on the 26th day of January, 1939, the defendants Jeff Clark and Leotia E. McIver were covered by the policy of insurance issued by the plaintiff herein.

2. That at the time of the accident between Loraine Johnson and the automobile described in the policy of insurance issued by plaintiff, Jeff Clark, the assured was the operator of said automobile.

3. That by the terms of said policy of insurance the plaintiff herein is required to defend the said suit and to pay and discharge any judgment rendered against Jeff Clark or Leotia E. McIver within the limitation of said policy'

on the grounds that no such conclusions of law can be properly adduced from the evidence and are against law.

VI.

The trial court erred in rendering judgment for defendants for the reason that the judgment is not supported by the evidence and is against law.

VII.

The trial court committed a manifest abuse of discretion in denying the plaintiff's declaration for relief as prayed for in that said court erred in not applying established principles of law applicable to the facts herein.

VIII.

The trial court erred in finding as set forth in its supplemental findings and conclusions contained in the memorandum opinion as follows:

> 'The court therefore finds as a fact that Gracie Vaughn was not driving or in actual physical control of the motor vehicle at the time of the accident; that she was activating none of the operating devices of the automobile; that her role was a passive one, and she *is* no way interfered with the operating activities of Mr. Clark. While not actually in the driver's seat, Clark was in full control of such operating devices as he deemed expedient to use in the emergency. The court further finds that Mr. Clark was actually in physical control of the motor vehicle at the time of the impact.'

on the grounds that said supplemental finding is not supported by the evidence and is against law.

IX.

The trial court erred in its conclusions as set forth in its supplemental findings and conclusions contained in the memorandum opinion as follows:

> '* * * a declaration that the plaintiff insurance company is excused from the obligation of its policy contract is denied.'

on the ground that no such conclusion can be legally based on the evidence and is against law." [R. 150-155.]

ARGUMENT.

Summary.

The appellant did sustain the burden of proof in the court below because the undisputed facts show that appellee Grace Vaughn was an operator of the automobile at the time of the accident in question and there is no evidence substantial or otherwise that appellee Jeff Clark was the sole operator of the automobile at the time of accident.

The trial court committed a manifest abuse of discretion since it did not include in its hypothesis upon which it denied appellant the relief sought, consideration of established principles of law applicable to the facts at bar which if considered show conclusively that appellant should have the relief requested.

POINT I.

The Appellant Did Sustain the Burden of Proof in the Court Below Because the Undisputed Facts Show That Appellee Grace Vaughn Was an Operator of the Automobile at the Time of the Accident in Question and There Is No Evidence Substantial or Otherwise That Appellee Jeff Clark Was the Sole Operator of the Automobile at the Time of Accident.

Specification of Errors I and II [R. 150-151]:

"I.

The trial court erred in finding as set forth in paragraph 5 of the findings of fact as follows:

'5. * * * that when the automobile described in the policy was within approximately forty feet to the east of said stopped westbound automobile, Jeff Clark seized the steering wheel with both hands and swerved the automobile described in the policy to the left and over to the south side of said Fourteenth street and past said stopped automobiles; * * *

'* * * that prior to the impact and while Jeff Clark was steering the automobile described in the policy, he reached, with his left hand, across Grace Vaughn's lap for the emergency brake lever of the automobile described in said policy and applied the said emergency brake, keeping his left hand on said emergency brake lever; that said emergency brake lever is located on the left hand side of the steering wheel of the automobile described in the policy; that after Clark seized the steering wheel Grace Vaughn did not attempt to steer the car or to operate the clutch or brake pedal; * * *'

on the grounds that said finding is not supported by the evidence and is against law."

"II.

The trial court erred in finding as set forth in paragraph 10 of the findings of fact as follows:

'That the automobile at the time of the accident was operated by said Jeff Clark and was not operated by any person in violation of the Vehicle Code of the State of California; that said automobile at the time of said accident was not operated by said Grace Vaughn'

on the grounds that said finding is not supported by the evidence and is against law."

The denial of the declaratory decree in question favorable to appellant was grounded on the premise that the evidence shows that Jeff Clark solely was in actual control of the automobile at the time of accident.

Consideration of this phase of the appeal involves necessarily a review of the evidence pertaining to the operation of the automobile.

It is proper to review the evidence on an appeal of this character since "It is a question of law whether there was substantial evidence to uphold the finding of the trial court." (*Zurich Gen. Ass. etc. v. Mid-Continent etc.*, 43 Fed. (2d) 355.)

Involved in the question now under discussion are the physical facts pertaining to the design and description of the driving compartment of the automobile. These facts are naturally undisputed and are of utmost importance in a case like the one at bar since they limit or describe the field of conduct of the parties in question with respect to the operation of the automobile.

These physical facts are fixed and immovable and the reliability of the findings in question that Jeff Clark was the sole operator of the automobile at the time of accident can be tested by the known and undisputed ability of all persons to operate said mechanisms of the automobile involved.

Jeff Clark described [R. pp. 116 to 119 incl.] that next to the door of the automobile on the left hand side was the emergency brake. It is up under the cowl and has a handle to pull straight back. Next, on the floor board is the clutch pedal and to the right of the clutch pedal is the foot brake pedal. Next (moving to the right) is the accelerator. The steering gear (wheel) is in the conventional position and attached to the steering column and just under the steering wheel is an electric hand or selective gear shift. The gear shift is operated by electric current supplied by the battery. The gear shift extends out from the steering column. It is like a thin steel rod and as you hold the steering wheel you change the gears by moving the gear shift lever with one of your fingers. In order to change gears it is necessary to also use your foot on the clutch pedal. And, to throw the automobile out of mechanical control the clutch must be pushed forward, otherwise the engine is engaged.

Undoubtedly, this court may take judicial knowledge of the means of operating an automobile as that term is universally understood.

Driving or operating an automobile means having available to use all of the driving devices which permit one to safely operate an automobile.

Driving or operating an automobile does not mean the single act of steering or merely turning the steering wheel.

Driving or operating an automobile does not mean the single act of applying the emergency brake.

Nor, would a combination of steering and reaching for an emergency brake mean driving or operating an automobile.

But, it is to be observed that the finding of the court below that Jeff Clark was the sole operator of the automobile is based upon the single facts that he reached for and applied the emergency brake and steered the automobile.

In other words, the trial court draws the inference that Jeff Clark was the sole operator from the fact that he applied the emergency brake and manipulated the steering wheel of the automobile.

A finding upon an inference so deducted is clearly erroneous and is adverse to legal reasoning.

The term "driver" and "operator" are defined in the Vehicle Code as a person who drives or is in actual physical control of a vehicle. (Sections 69 and 70.) Thus defined, it does not mean that it should receive the extremely narrow interpretation placed on it by the trial court [R. 57] for if it were so, such a narrow interpretation would not carry its burden when used throughout the driving provisions found in the code.

As an example, under the interpretation attributed to "drive" or "operator" in the findings below, Jeff Clark because he applied the emergency brake and manipulated the steering wheel could be guilty of:

> Sec. 510. Speeding—yet he never touched the accelerator.
>
> Sec. 546. Failure to give hand signals before turning, starting or stopping, notwithstanding that

because of his position in the automobile it would be physically impossible to so signal.

Sec. 596. Driving while there is someone in the front seat which interferes with the driving mechanism of vehicle. If Grace Vaughn was not the driver obviously her conceded position behind the steering wheel prevented Jeff Clark from full freedom to disengage the clutch.

Sec. 597. Failure to sound horn when traveling upon mountain highways and approaching a curve where the view is obstructed within 200 feet;

and other sections of said Vehicle Code equally amenable to the same paraphrastic examples as quoted.

So, tested by the foregoing standards it is obvious that the term driver or operator was not to secure the narrow interpretation placed by the trial court. It is to receive that interpretation which expresses the general understanding that is ascribed to the term. That interpretation appellant submits is that a driver or operator is the person who is behind the steering wheel and in the common and convenient position to apply and be available to apply the driving devices to start, stop and guide the automobile. Thus interpreted it is noted that the term "driver" or "operator" fits into and makes workable all of the provisions of the Vehicle Code of California with reference to the rules of the road (sections 500 to 598 generally).

Appellant submits that defining the term "driver" or "operator" or the related terms "driven" or "operated" as used in the policy of appellant must be done in light of the usage of such terms in the Vehicle Code of California.

To be sure, it is an automobile policy and it must be said here that the parties to the contract understood the terms in question as those terms are generally understood and used in the Vehicle Code of California. This naturally follows as it was in compliance with said Vehicle Code that the automobile was to be operated and driven and the manner in which the driver complied with the Vehicle Code determined the extent of the risk.

Tested by those provisions of the Vehicle Code peculiarly pertaining to the operation of a motor vehicle we find as demonstrated above that driving is not alone using single devices in an emergency but connotes the availability to operate all devices necessary for safe operation of the vehicle.

Viewing the evidence as a whole and disregarding for the moment the original statements by which Jeff Clark reported the incidents it is revealed in the record that:

A) Jeff Clark was riding in the front seat at the right side of the driver [R. 78];

B) Miss Grace Vaughn was driving [R. 78];

C) To the right of Jeff Clark was seated Maxine Vaughn sister of Grace Vaughn [R. 99];

D) Jeff Clark was in said same position at the time of the collision [R. 79-81];

E) Just prior to the collision Grace Vaughn applied the brakes [R. 79];

F) Jeff Clark swerved the automobile to left just prior to the collision [R. 79];

G) Jeff Clark grabbed the steering wheel with one hand and reached for the emergency brake with the other [R. 87];

H) In reaching for the emergency brake Jeff Clark had to reach over the lap of Grace Vaughn and under the steering wheel column and hold onto the emergency brake [R. 103];

I) Jeff Clark manipulated the steering wheel before he seized the emergency brake [R. 103];

J) Jeff Clark didn't think Grace took her hands off of the wheel even when he grabbed it [R. 107];

K) Jeff Clark first grabbed the steering wheel with his left hand and then changed hands, placing his right hand on the steering wheel and reaching for the emergency brake with the left hand [R. 108].

L) Jeff Clark was of the opinion he was driving at the time of collision [R. 79].

Miss Grace Vaughn added, in substance:

A) That she was seated in the drivers seat [R. 127].

B) That she couldn't remember what she did after Jeff Clark grabbed the wheel "It happened so quick" [R. 130].

C) Her hands might have and might not have remained on the steering wheel up to the point where the automobile was finally stopped [R. 131].

D) Her feet were on the brake and clutch at the time of accident and they were both depressed [R. 131].

E) The automobile was about 12 feet from the pedestrian when the witness first saw the pedestrian [R. 133].

F) She was sitting up at the wheel at all times [R. 133].

Maxine Vaughn in substance stated:

A) Grace Vaughn had been operating the automobile about 20 minutes [R. 135].

B) As the automobile approached the intersection in question Grace Vaughn was at the (steering) wheel; Mr. Clark was next to Grace and the witness was seated next to Mr. Clark [R. 135].

C) As the automobile approached said intersection Mr. Clark was telling Grace Vaughn to slow down and then he took the wheel and swerved the automobile [R. 136].

D) After Mr. Clark took the wheel he tried to get it back onto the north side of the street and he did by the time the car got down one-half a block further [R. 138].

E) "Q. I mean before you hit Mrs. Johnson, what was the path of your car?

A. Oh, it was on the north side until we came to the cars, about 20 feet of the cars, and then he swerved it toward onto the south side" [R. 138].

F) Mr. Clark was sitting with his back to the witness, and facing the driver [R. 140].

G) After Mr. Clark took hold of the wheel he reached for the emergency brake [R. 141].

A study of the foregoing evidence shows that at no time did Grace Vaughn relinquish her position at the driving wheel or leave the driving seat. Her own testimony is that she stayed at the wheel. It is obviously not a case where the complete control of the automobile was vested in Jeff Clark because the devices such as clutch and footbrake were still being activated by Grace Vaughn. It may be true that the precise moment of the impact

Grace Vaughn was not pressing the footbrake but it must be borne in mind that Grace Vaughn started to stop the vehicle and release the clutch before Jeff Clark seized the wheel and Grace Vaughn did not cease or abstain in these efforts.

When the foregoing testimony is viewed with the evidence of the description of the driving devices of the automobile it appears very strongly that it was a physical impossibility for Jeff Clark to be the sole operator of the automobile at the time in question. If he did anything with respect to the operation of the automobile it was simply and merely to help or assist Grace Vaughn in the stress of the emergency created by her failure to stop the automobile. To this extent he only shared the responsibility of driving.

In this case, one may feel at first impression that the question of who was the sole operator of the vehicle is a disputed question of fact. The inclination is to submit the case to the rule, so well known, that if there is substantial evidence to support the fact finder the appellate tribunal cannot interfere.

In the case at bar, however, it is not a question of a conflict in substantial evidence. All witnesses testified that Grace Vaughn was behind the driving seat. No witness testified directly or indirectly to a fact which stated that Grace Vaughn did not drive or was not driving at the time of accident.

The only conflict that does exist is as to when Jeff Clark seized the wheel. In his original report of accident to appellant he said that he did not touch the steering wheel until after the automobile struck the appellee pedestrian [R. 96, 84]. And at trial he stated he seized the wheel before the said impact. But, such contradictions do not effect nor create a substantial conflict in the evidence as a whole when such evidence as bearing on the acts of Grace Vaughn show that she at all times was driving the automobile.

There is thus no substantial conflict in the actual facts that Grace Vaughn was in the driving seat and did manipulate some of the driving devices in the chain of events that led up to the actual impact and that Jeff Clark did handle the steering wheel and reach for the emergency brake.

The rule applicable, is whether the facts as testified permit the inference that Jeff Clark was the sole operator or driver of the automobile at the time of accident. This question is one of law. In *Smellie v. So. Pac.*, 212 Cal. 540, the Supreme Court of California, after making an exhaustive study of the subject of inferences and their factual personalities held that the question of whether an inference could be legally deduced from a given state of facts involved the question of whether the evidence was capable of permitting the inference desired and whether the evidence is capable is a question of law.

In said case the court was considering the capability of a presumption and stated at page 555:

> "When the presumption is invoked by a party and his evidence is not inconsistent therewith, it is in the case, provided, of course, the *evidence sufficiently establishes a sphere or field within which the presumption can operate. Whether it does must, of course, be decided by the trial court as a question of law.*" (Italics ours.)

While in a strict sense the court uses the word presumption this does not devalue the rule as to inferences since the term inferences and presumptions are used interchangeably. (*Bushnell v. Tashiro,* 115 Cal. App. 563.)

Applied to the question under discussion the rule paraphrased is: Whether the acts of Jeff Clark in seizing the steering wheel and reaching for the emergency brake establish a sufficient field or sphere upon which the inference that he was the sole driver can be predicated is a question of law.

Reflecting upon the evidence as quoted *supra,* we find that the only fact which supports the finding that Jeff Clark was the sole driver is his own opinion that he was driving. Such an opinion of Jeff Clark cannot qualify as substantial evidence to support the findings below for two reasons.

First, the opinion that he was driving is contradicted by the facts testified by him in that he only steered the automobile and attempted to reach for the emergency brake.

The testimony that he manipulated the steering wheel and reached for the emergency brake constitutes positive and direct evidence of his conduct and any inferences to be drawn from such evidence must be limited to the field or sphere there described. From such facts it cannot be inferred that he alone was the driver for as demonstrated *supra*, in this argument, those single acts do not constitute driving or operation as those terms are used in the contract of insurance in question.

It was held in *Waizman v. Black,* 110 Cal. App. 610, that:

> "So, too, the mere opinion or conclusion of the witness in his direct examination could have no weight as against facts stated by him in his cross-examination which are *necessarily opposed to such opinion.*"

Secondly, an opinion or conclusion does not constitute real or substantial evidence.

In the case of *Barton v. McDermott,* 108 Cal. App. 372, at page 380, the court stated:

> "It was said in Gardiner v. Holcomb, 82 Cal. App. 342, 350 (255 Pac. 523, 526):
>
> " 'On the question of the conclusiveness of the findings of the trial court we may concede that the rule of law governing appellate procedure precludes this court from making further inquiry than to ascertain if there is any evidence of a substantial character and not inherently weak or improbable which

supports the finding, and if such be disclosed the finding should stand irrespective of what evidence there might be opposed to the finding.

" 'However, without regard to the qualifications of the rule, but accepting it in all its strength, there is still the necessity that there be some support for the finding, and that *as against the positive and direct evidence of a fact a mere conclusion or general statement will not serve to meet the definition of substantial or any evidence.* (See Houghton v. Loma Prieta Lumber Co., 152 Cal. 574 (14 Ann. Cas. 1159, 14 L. R. A. (N. S.) 913, 93 Pac. 377); 2 Cal Jur. 918, *et seq.*)' " (Italics ours.)

In the case of *Thoreau v. Industrial Accident Commission,* 120 Cal. App. 67, the court likewise decided that a mere conclusion will not serve to meet the definition of substantial or any evidence as against positive, direct evidence of a fact.

Concluding discussion of this point appellant submits that the evidence as a whole shows that Grace Vaughn was an operator of the automobile at the time of accident and under the rules quoted the findings of the trial court that Jeff Clark was the sole operator of the automobile is without evidentiary support.

There is no individual discussion of Specification of Errors assigned Nos. V and VIII since it would be repetitious of the foregoing argument. Said Assignments V and VIII involve the same subject matter covered by the foregoing argument.

POINT II.

The Trial Court Committed a Manifest Abuse of Discretion Since It Did Not Include in Its Hypothesis Upon Which It Denied Appellant the Relief Sought, Consideration of Established Principles of Law Applicable to the Facts at Bar Which If Considered Show Conclusively That Appellant Should Have the Relief Requested.

Assignment of Errors VII, and IX [R. 153-155]:

"VII.

The trial court committed a manifest abuse of discretion in denying the plaintiff's declaration for relief as prayed for in that said court erred in not applying established principles of law applicable to the facts herein."

"IX.

The trial court erred in its conclusions as set forth in its supplemental findings and conclusions contained in the memorandum opinion as follows:

'* * * a declaration that the plaintiff insurance company is excused from the obligations of its policy contract is denied.'

on the grounds that no such conclusion can be legally based on the evidence and is against law."

Appellant insisted in the court below and asserts here that decision of the case at bar is controlled by the decision of the Supreme Court of the United States in *State Farm Mutual Automobile Insurance Co. v. Coughran,* 303 U. S. 485.

As will be herein demonstrated the factual elements of the *State Farm* case as well as legal principle of law

there involved are so identical it is at once apparent that said case presents the solution to pivotal questions involved on this appeal. Because of its importance, counsel for appellant takes liberty to intimately discuss the facts and law of said case.

The record of the *State Farm* case reveals that it was a suit to recover from an insurance carrier an unsatisfied judgment obtained against a policyholder. The controversy arose out of an automobile collision involving an automobile covered by the named insurance carrier. The automobile at the time of the accident was occupied by the wife of the assured and one Nancy Leidendeker. Nancy Leidendeker was driving and at the time of the accident the wife of the assured, who was seated beside Nancy Leidendeker, seized the steering wheel. The court below found:

> "XVII. The court finds that prior to the collision * * * Helen B. Anthony seized the steering wheel of the insured automobile and steered the same to the right, proximately causing the same to come into collision with the said truck and proximately causing the same to turn to its right, proximately causing the collision of plaintiff's car and the injuries and damages suffered by him."
>
> "XII. * * * ; that the direct cause of the collision between the insured automobile and a truck owned by the San Pedro Commercial Company was the act of Helen B. Anthony in seizing the steering wheel of the automobile at and immediately preceding the moment of impact and collision."

Nancy Leidendeker was a minor and not permitted under the applicable laws to drive a motor vehicle in the State of California. This being so, the insurance carrier refused to recognize the loss as within the policy of insurance. The policy provided:

> "The Company shall not be liable and no liability or obligation of any kind shall attach to the company for loss or damage * * * (D) Unless the said automobile is being operated by the assured, his paid driver, members of his immediate family, or persons acting under the direction of the assured. (E) Caused while the said automobile is being driven or operated by any person whatsoever * * * violating any law or ordinance as to age or driving license;"

The evidence also disclosed in addition to the lack of driving license of Nancy Leidendeker that the assured had forbidden her to drive and her operation of the automobile were contrary to his instructions.

At this stage of our discussion it can with propriety be mentioned that if under the policy provisions in the cited case it could be said that Helen B. Anthony, wife of the assured, was solely operating the automobile at the time of the collision, then the loss in dispute would be covered since said automobile was then being operated by a member of the assured's immediate family and hence included within the language of the policy quoted *supra*.

The Supreme Court in supporting the action taken by the insurance carrier stated:

> "If, as found, the automobile was being jointly operated by the wife and the girl the risk was not within the policy. The latter was forbidden by law to operate or drive jointly or singly. If the wife was

> in control the statute forbade her to permit driving by the girl. *In any view* when the collision occurred the car was being driven or operated in violation of the statutes." (Emphasis ours.)

The judgment of the Circuit Court of Apepals was reversed and the cause remanded to the District Court with instructions to enter judgment for the insurance carrier.

It is a matter of common understanding in the field of jurisprudence that no two cases are identical in facts. Generally speaking this is true if we attempt to measure each case and endeavor to find precisely the same actions of human behavior. This cannot be done since human behavior is as variable as humans vary. However appellant submits that where as here a particular set of facts, namely, where an unlicensed minor is driving an automobile and immediately prior to a collision an occupant seizes or otherwise attempts to control the automobile, and it has been adjudicated that such act of the occupant does not alter the prohibited driving by a minor, then we say that all cases falling within the purview of said particular set of facts must meet the same adjudication.

The adjudicated conclusion placed on the facts in the *State Farm* case, *supra*, impells the same conclusion to the facts of the case at bar since here we have the same situation, *viz.*, the act of the assured Jeff Clark in seizing the steering wheel from an unlicensed minor and a resultant collision.

The court below in its opinion says that the *State Farm* case, *supra*, is not controlling for two reasons:

> 1) That the complaint at bar does not allege joint operation but only sole operation by Grace Vaughn [R. 59].

2) That there is no convincing evidence that Grace Vaughn activated any of the operating devices of the automobile and her mere presence behind the driving which is not determinative. [R. 59].

The first ground *supra* asserted by the trial court is in the opinion of appellant fallacious. Determination of the applicability of the decision in *State Farm* case to the case at bar in no way depends on the form of action which appellant adopts to seek relief.

The Rules of Civil Procedure adopted in 1938 under which the complaint below was drafted provide:

> "All pleadings shall be construed so as to do substantial justice." (Rule 8, Sub. F.)

And, with the adoption of the new rules the spirit of the law as expressed in *Yankwich, New Federal Rules of Civil Procedure* (pp. 14, 15) that:

> "He will be granted the relief, legal or equitable, to which he is entitled under the facts alleged and proved, irrespective of the form he has chosen or the relief he has actually asked. He will be sent out of court only when he is not entitled to any relief."

was intended to apply to the construction of all pleadings in the court below.

Likewise, the failure to ask to amend should not penalize appellant to the extent of cutting off from its case the applicability of the decision in the *State Farm* case since the rules of Civil Procedure (Sec. 15, Sub. B) provide that the failure to amend to conform to proof shall not affect the result of the trial of the involved issues. Particularly, where as here the issue of joint operation was tried without objection on the part of the appellees and

they thus impliedly consented to the issue of joint operation as being wholly involved in the case. As to such a situation the Sec. 15, Sub. (B) states:

> "When issues not raised by the pleadings are tried by the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings."

Therefore, if the failure to ask to amend so as to allege joint operation is the basis of the trial judge for denying to appellant the holding of the *State Farm* case as applied to the facts at bar and thus denied appellant its declaratory decree as prayed for, the trial court is clearly in error and has thus abused the exercise of legal discretion since he failed to include consideration of applicable principles of law quoted when weighing the matter of proof.

The error of excluding the question of joint operation and the prejudicial harm to appellant is emphasized by the fact that even looking at the proof most unfavorably to appellant the premise of joint operation by Jeff Clark and Gracie Vaughn cannot be avoided.

The second ground *supra*, asserted by the trial court for refusing to apply the opinion in the *State Farm* case is based upon the fact that the trial court believed that Jeff Clark when testifying at the trial was creditably relating what he did on the day in question with respect to the operation of the automobile and that his statements when reporting the accident to appellant were false and untrue. As a matter of fact said statements are branded by the trial court as being the product of an over zealous investigator for appellant.

To arrive at this result ignores completely the significant facts surrounding the reason why Clark departed in his

testimony in the court below from the facts stated in his original report.

Before discussing those facts and their application to the decision on this appeal it will be helpful to reflect upon the particular policy provision out of which controversy at bar arises.

The policy provides that it shall not apply:

> "(C) under any of the above coverages, while the automobile is operated * * * by any person in violation of any state * * * law as to age applicable to such person * * *";

In *Brown v. Travelers Insurance Co.,* 31 Cal. App. (2d) 122, (hearing in California Supreme Court denied), a provision in an insurance policy contained identical language as in the case at bar was construed. The sole question there involved was whether such a provision was valid in California. In upholding the validity of such provision and in affirming judgment in favor of the insurance carrier, the court observed:

> "This rule of law is consistent with the requirement of the Civil Code, section 1636, that a contract must be interpreted so as to give effect to the mutual intention of the parties as it existed at the time of the contract. There can be no doubt that the insurer intended to eliminate liability in such a case as the present one by inserting in its contract the exclusion clause here questioned. It is equally clear that the assured in reading the exclusion clause would have believed that she was not protected in the event she permitted her minor son to drive her automobile

without obtaining a license, which is contrary to the provisions of the Vehicle Code. There is no valid reason why the loss occasioned by assured's permitting her son to violate a state law should be shifted to defendant."

Aside from the strictly legal aspect of the provision in question it is a fact not to be denied by either law or logic that such a provision is intended to safeguard the company from, and not expose it, to a hazard which necessarily results from permitting in the first instance the automobile being controlled or driven by unlicensed minor. The fact of permitting the unlicensed minor to start a chain of events which ultimately produces a loss is included within the prohibition stated to the same extent as though the minor actually has full control of the automobile at the precise moment of collision.

The clause in question was designed as notice to the assured that he was not to permit unlicensed minors to drive or operate his automobile. The assured has by accepting the policy agreed that he will keep from behind the steering and driving devices unqualified persons in order that they do not create the hazard and calamity which inevitably follows. Certainly the carrier is entitled to rely upon the fact that no one under age and without a license will drive the automobile covered by the policy.

In California, all persons must submit to an examination of their driving ability in order to demonstrate their qualifications to safely drive an automobile. Sections 267 and 268, Vehicle Code of California, provide:

"267. Examinations for License. Upon application for an original license the department shall re-

quire an examination of the applicant and shall make provision therefor before an officer or employee or authorized representative of the department in the county wherein the applicant resides within one week after such application is presented to the department.

268. Scope of Examination. The examination shall include a test of the applicant's knowledge and understanding of the provisions of this code governing the operation of vehicles upon the highways. his understanding of traffic signs and signals and the applicant shall be required to give an actual demonstration of his ability to exercise ordinary and reasonable control in operating a motor vehicle by driving the same under the supervision of an examining officer. Said examination shall also include a test of the hearing and eyesight of the applicant and such other matters as may be necessary to determine the applicant's mental and physical fitness to operate a motor vehicle upon the highways and whether any ground exists for refusal of a license under this code."

And with minors, the constituted state authority is not only required to give an examination as prescribed by sections 267 and 268, Vehicle Code, *supra,* but is enjoined to make investigation as to the actual and real necessity for a license of a minor and imposed such restrictions as may be deemed necessary to assure the safe operation of a motor vehicle by the minor licensee. (Sec. 257, Vehicle Code of California.)

Such legislation is impliedly enacted into each contract of insurance by law. With the current trend to avoid automobile collision casualties by the legislative requirement to examine driving ability of all persons who seek

the privilege to drive, it cannot be said that a provision in a policy of insurance which prohibits unlicensed minors from driving is in any sense unfair.

It was observed by the court in *Phillips v. New Amsterdam Casualty Co.,* 190 So. 565, when speaking of a provision in the policy which excluded coverage when the automobile was driven by an unlicensed minor, that:

> "In fact, it is our opinion that the clause favors public policy in that it encourages the enforcement of the laws of this state with reference to the operation of motor vehicles on streets, public roads, and highways of the state."

With the validity of the policy provision thus established and at the risk of reaching an anti climax, appellant raises this question: Should the effectiveness and construction of said policy provision be nullified by the simple process of Jeff Clark in grabbing the wheel and steering the automobile immediately prior to the collision in the case at bar?

In other words, can Jeff Clark render absolutely worthless any provision or method in the policy whereby the insurer legally limits its liability or specifies the risks it agrees to insure, by the mere seizing of the steering wheel of the automobile in the stress of the emergency of an impending accident?

These questions strike at the very core of the litigation at bar and the judgment appealed from gives judicial sanction to just such conduct on the part of Jeff Clark.

The effect of the decree of the court below in denying the relief asked for by appellant on all the facts produced

in the court below nullifies the agreement in question in the policy and sets up a standard which eliminates any valid effort on the part of an insurance carrier to apprise itself of risks contemplated under the policy and to measure by insuring agreements the conditions under which it will validly assume liability by its contract.

To reach the result it did, the trial court grounded its decision on the fact that the proof showed that Jeff Clark was the sole operator of the automobile at the time of the accident in question. The trial court adopted *in toto* Jeff Clark's testimony given at the trial that he steered the automobile to the left at a point prior to the point of impact and *his opinion* that he had full control at the time it struck appellee Johnson.

The trial judge rejected the testimony of Grace Vaughn to the effect that she was sitting up at the wheel with her feet on the brake and clutch pedals and hands on the steering wheel on the theory that Grace Vaughn evidently was flustered and "disclosed no certain knowledge of what happened after Mr. Clark grabbed control of the automobile" [R. 57].

Any discrepancy between Jeff Clark's testimony and Grace Vaughn's testimony was thus resolved in favor of Jeff Clark's testimony [R. 57]. In other words as the trial court puts it, "the testimony of an experienced man, of mature years, who evidently was cool and collected, and who was thinking and acting quickly and efficiently, is more reliable and credible" [R. 57].

But the trial court overlooks entirely the fact that Jeff Clark was of the clear and unambiguous opinion that Grace Vaughn:

1) Steered the automobile to miss the standing cars ahead.

2) Had full control of the driving devices of the automobile at the time of impact

and that he did not:

1) Touch the steering wheel or

2) Apply the brakes

until after the impact and that he held such opinion and believed such to be a fact *until he talked* to Grace Vaughn the night before the trial [R. 81].

The very witness that the trial court rejects as unreliable turns out to be the only reason why Jeff Clark changed his original report and repudiated the contents of same at the time of trial. In other words, the unreliable Grace Vaughn refreshes Jeff Clark and because he was thus refreshed he is regarded as more reliable and her testimony rejected.

As had been indicated above, the significant facts surrounding the change in Jeff Clark's testimony is the fact that Jeff Clark did not make a change in his version as to when he touched the steering wheel, until the night before the trial, some four months following the accident, and he gave no factual reason for the change other than the mere presuasion on the part of the Vaughn family.

The evidence discloses [R. 94] that he is in the real estate loan and *insurance* business. He thus knew at the time of his original report by reason of his own business training and experience the importance of giving an accurate report of how the accident happened. His business environment associated with insurance emphasized the importance of a true picture of the accident in the first instance.

The above observations bear considerable pressure upon the question of the propriety of rejecting the original reports made by Jeff Clark to appellant. If said reports were taken as true in preference to Clark's testimony on the stand, there would exist no question but that appellant would clearly be entitled to the relief sought. There would be no question that Grace Vaughn was the sole driver of the automobile.

When, however, Jeff Clark changes the narration of his participation in the operation of the automobile and cites no factual event for such narration and the trial court permits such changed evidence to outweigh the evidence as contained in Jeff Clark's original report, we say that judicial discretion has not been exercised in conformity with the spirit law. This is so, because as shown *supra,* Point 1, the preferred evidence is opposed to the physical facts and is not substantial evidence.

Appellant does not challenge the inherent power of a trial court to judge the credibility of witnesses appearing before it nor its power to accept one of two contradictory narrations of a witness. These powers are within its discretion.

However, discretion cannot be loosely applied. There must exist a reasonable hypothesis upon which discretion

is exercised. There cannot exist under the guise of judicial discretion bold and bare sorting of testimony. If Jeff Clark's version given at the trial is to be preferred it must be consistent with the known physical facts and there must exist probability of the new version being more accurate than his original report.

Taking into account Jeff Clark's business experience, the reason for the "change" in narration and then reflecting such facts on the physical facts as heretofore demonstrated, it appears that the original version is not inherently improbable and should not be arbitrarily rejected as in the case at bar.

Judicial discretion is defined in *Bailey v. Taaffe,* 29 Cal. 424, to be:

> "The discretion intended, however, is not a capricious or arbitrary discretion, but an impartial discretion, guided and controlled in its exercise by fixed legal principles. It is not a mental discretion, to be exercised *ex gratia,* but a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice. In a plain case this discretion has no office to perform, and its exercise is limited to doubtful cases, where an impartial mind hesitates. If it be doubted whether the excuse offered is sufficient or not, or whether the defense set up is with or without merit in *foro legis,* when examined under those rules of law by which judges are guided to a conclusion, the judgment of the Court below will not be disturbed. If, on the contrary, we are satisfied beyond a reasonable doubt that the

> Court below has come to an erroneous conclusion. the party complaining of the error is as much entitled to a reversal in a case like the present as in any other."

Likewise it was stated in *Essig v. Seaman,* 89 Cal. App. 298 that:

> "Although appellate courts have been loath to reverse the action of the trial courts in their exercise of discretion in such matters, there must be some restraint upon a too liberal exercise of that jurisdiction. In the exercise of its discretion a court cannot ignore a statutory law or hold any of its provisions meaningless. Unbridled discretion is dangerous. The exercise of discretion by optimists is very likely to be different from the exercise of discretion by pessimists. 'It is different in different men, and in the same man it is not always the same.' It is not to be exercised *ex gratia.* (Bailey v. Taaffe, 29 Cal. 423.)"

And in *Board of Pub. Ser. Commrs. v. Spear,* 65 Cal. App. 216, the court observed:

> "When a court is given discretion in the exercise of authority it must exercise that discretion in a sound, fair, and reasonable manner; * * *."

The foregoing definitions aptly apply here since the discretion exercised in the case at bar was not in appellant's opinion sound and reasonable when compared to the substantial evidence as a whole, which evidence reveals one of two situations, viz., either sole or joint operation of an automobile by an unlicensed minor, either of

which is clearly excluded under its insuring agreement in the contract existing between appellant and appellees McIver and Clark.

Specification of Errors assigned numbers III, IV and VI are covered by points and authorities argued above and further argument under these specifications would be mere repetition.

Conclusion.

It is respectfully urged that the judgment below be reversed, as the ends of justice require that the contract provision in question be enforced. Appellant submits, that in reality the conclusion is inescapable that Grace Vaughn, the minor appellee, was an operator of the automobile at the time of the accident in question. This being so, it is no ground for refusing to enforce the contract provision, that said minor may have been helped by another person in the act of driving. The parties to the contract have agreed that no coverage is granted by the contract when the automobile is operated singly or jointly by an unlicensed minor and appellant only asks that it be given the same adjudication by its contract provisions as is accorded other litigants in the same circumstances.

The judgment below should be reversed.

Respectfully,

C. F. Jorz,

Attorney for Appellant.